PLUNKETT COONEY

March 19, 2010

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Via Electronic Filing

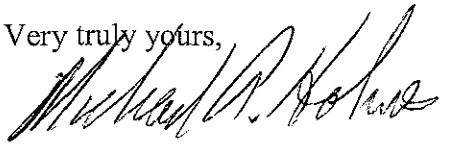
Re: In the Matter of Joint Michigan CLEC Petition for Expedited Declaratory Ruling and Motion for Temporary Relief
WC Docket No. 10-45

Dear Ms. Dortch:

Enclosed for filing are the Reply Comments of the Telecommunications Association of Michigan in the above-captioned matter.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	WC Docket No. 10-45
Joint Michigan CLEC Petition for Expedited Declaratory Ruling and Motion for Temporary Relief	

REPLY COMMENTS OF THE TELECOMMUNICATIONS ASSOCIATION OF MICHIGAN

The Telecommunications Association of Michigan (TAM) submits the following Reply Comments to the Federal Communications Commission (Commission) in the above-referenced proceeding.[1]

Introduction and Executive Summary

The Initial Comments of many parties[2] in this proceeding put forth several common reasons that the Commission should deny the Petitioners' request to preempt Act 182 in its entirety:

1. On its face, Act 182 does not prohibit the ability of any entity to provide any interstate or intrastate telecommunication service as would be required for preemption under 47 USC §253(a).
2. A determination that Act 182 has "the effect" of prohibiting the ability to provide such services (which it does not), requires substantial, credible, and persuasive quantitative data and hard evidence that competitive entry is materially inhibited. This data should include a rigorous analysis of the comparative costs of ILECs and

[1] On February 19, 2010 TAM filed its Opposition to the Motion for Temporary Relief of Petitioners on February 19, 2010. On February 22, 2010, the FCC issued its Public Notice, establishing a Pleading Cycle in this case with comments due on March 9, 2010 and reply comments due on March 19, 2010. The Commission advised TAM that its February 19th filing would be treated as its Initial Comments in this proceeding.

[2] These include TAM, AT&T, Century Link, Independent Telephone and Telecommunications Alliance (ITTA), and the Michigan Public Service Commission (MPSC). The Rural Independent Competitive Alliance (RICA) neither supported nor opposed the Petitioners; rather discussing "the substantive policy issue of disparity treatment of ILECs and CLECs". RICA Comments, at p 1.

CLECs to operate, repair, and maintain their respective networks, as well as a comparison of the revenue streams that are available to recover those costs.

3. The conclusory statements of Petitioners and their supporters[3] that ILECs eligible to receive funds from the Restructuring Mechanism will have an advantage in pricing their telecommunication services does not meet this burden.

4. A determination of any competitive effect of Act 182 requires consideration of the many differences in legal and regulatory requirements for ILECs and CLECs in Michigan, including an assessment of the competitive advantages that CLECs such as Petitioners have.

5. Even if the Commission were to find that Act 182 runs afoul of 47 USC §253(a) (which it does not), Act 182 satisfies the "safe harbor" provisions of 47 USC §253(b) by advancing universal service and preserving quality of service.

6. Act 182 is consistent with the FCC's stated policies and goals on the reform of access rates, intercarrier compensation, and Universal Service Funding (USF) by: (a) bringing intrastate switched access rates in line with interstate rate levels; (b) moving from implicit to explicit support of the network costs recovered in part with access revenues; and (c) advancing Universal Service by helping ensure telecommunication services to end users, particularly in areas served by rural ILECs, remain affordable. States should not be discouraged from starting down the path toward achieving the FCC's goals.

For the reasons set forth in its Opposition To The Motion For Temporary Relief and as more fully explained below, TAM urges the Commission to deny the Joint Petition and the Motion for Temporary Relief in their entirety.

[3] PAETEC Holding Corp and COMPTEL supported Petitioners.

ARGUMENT

I. THERE IS NO DISPUTE THAT ACT 182 ON ITS FACE DOES NOT PROHIBIT THE ABILITY OF ANY ENTITY TO PROVIDE ANY INTERSTATE OR INTRASTATE TELECOMMUNICATION SERVICE.

47 USC §253(a) proscribes state or local statutes or regulations which either (1) expressly prohibit the ability to provide any interstate or intrastate telecommunication service, or (2) have the effect of such a prohibition. Neither Petitioners nor the two commenters supporting their Petition seriously contend that Act 182 contains an outright prohibition on offering a competitive telecommunication service. The undisputed fact is that Act 182 does not contain such a prohibition. Rather, Petitioners and their supporters urge a finding that Act 182 has such an effect. As will be discussed below, Petitioners and commenters supporting Petitioners have not put forth sufficient data and supporting influence to demonstrate that Act 182 has the effect of prohibiting the offering of a telecommunication service.

II. A DETERMINATION THAT ACT 182 HAS "THE EFFECT" OF PROHIBITING THE ABILITY TO PROVIDE TELECOMMUNICATION SERVICES REQUIRES SUBSTANTIAL EVIDENCE AND QUANTITATIVE DATA THAT COMPETITIVE ENTRY IS MATERIALLY INHIBITED.

The legal standard to be applied in a request for preemption under 47 USC §253(d) is not whether the statute being challenged has the mere possibility of effectively prohibiting competition. Federal preemption requires proof of an "actual or effective prohibition".[4]

The quantum of supporting evidence which Petitioners must produce to successfully challenge a regulatory requirement was recently discussed by the Court of Appeals for the D.C. Circuit in *Rural Cellular v FCC*, 588 F3d 1095 (DC Cir. 2009). Although the legal issues presented in *Rural Cellular* were different than those in the present case, the ruling of the Court

[4] *Level 3 Communications v City of St Louis*, 477 F3d 528, 532 (8th Cir 2007) "Under a plain reading of the statutes, we find that a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

of Appeals is nevertheless instructive. There, Petitioners challenged the FCC's placement of a cap on USF high cost support provided to Competitive Eligible Telecommunication Carriers (CETCs). The Court of Appeals rejected the challenge, in significant part, because the CETCs offered no cost data to prove the level of support they were to receive under the cap was insufficient to enable them to provide service.[5] By analogy, Petitioners here provided no actual data to show that they are at a competitor disadvantage when the totality of their service costs and revenue streams are compared to those of the rural ILECs that will receive funds from the restructuring mechanism.

III. PETITIONERS HAVE FAILED TO CARRY THEIR BURDEN OF PROVING BY HARD DATA AND EVIDENCE THAT ACT 182 WILL HAVE THE EFFECT OF INHIBITING COMPETITION.

As TAM stated in its initial filing, "conspicuous by its absence from all of the Petitioners' filings is any attempt to quantify (emphasis in original) the financial harm which will allegedly result. Instead, Petitioners offer conclusory statements as to the competitive harms that will occur."[6]

As the Independent Telephone and Telecommunications Alliance (ITTA) observed:

> The Petitioners did not quantify the supposed gap in access-oriented revenues between eligible providers and noneligible providers. For lack of that data renders impossible the ability of any adjudicator to determine at this point whether the ILEC or the CLEC will emerge with a larger proportion of access-oriented funding and whether such difference rises to the standard of a barrier to entry.[7]

Particularly significant on this quantum of proof issue are the Comments of the Michigan Public Service Commission (MPSC). The MPSC described in detail the "work group" process

[5] 588 F3d at 1103-1104.
[6] TAM Opposition, page 9.
[7] ITTA Comment at p 6.

that led to the enactment of Act 182,[8] including the opportunity during the process for CLECs to provide information to the MPSC, legislators, and other stakeholders to document the potential financial impacts of the pending legislation. As the MPSC noted:

> The MPSC's role was to verify assertions of harm while protecting the confidentiality of data ... No CLEC provided data to the MPSC in response to any of the proposals addressed in the work shops. Therefore, the MPSC could not quantify the claims of harms to the CLEC.[9]

This deficiency has not been corrected by the CLECs or their supporters in their filings with the Commission in this proceeding. The MPSC further discussed the Commission's proof requirements for a successful showing in a 47 USC §253(d) preemption request, stating:

> [t]he FCC has also made it clear that the mere allegation, without 'credible and probative evidence,' that the state's action has actually had the effect of prohibiting the ability of the petitioner to provide telecommunication services is insufficient to support an FCC order preempting the challenged state action. ... [T]he FCC's determination about whether it is necessary to preempt state law under §253(d) is primarily a factual, not a precedential, determination. The reason for the joint CLEC deficit of discussion regarding the factual underpinnings for their claim of preemption is apparent. They don't have any. [10]

As demonstrated by TAM in its initial filing, as well as the initial comments of most parties,[11] Petitioners have failed to carry their burden of demonstrating an actual anticompetitive effect of Act 182.

IV. A DETERMINATION OF THE ACTUAL EFFECT OF ACT 182 ON COMPETITION REQUIRES CONSIDERATION OF THE DIFFERENCES IN LEGAL AND REGULATORY REQUIREMENTS AND NETWORK COSTS BETWEEN ILECs AND CLECs.

In *TCG New York v City of White Plains*, 305 F3d 67 (2nd Cir 2002), the Court of Appeals considered whether provisions of a local ordinance governing the placement of

[8] MPSC Comment at pp 2-4.
[9] *Id.* pp 3-4.
[10] *Id.* pp 9-10.
[11] See footnote 2 *supra*.

telecommunication facilities in public rights-of-way had the effect of materially inhibiting the ability of a CLEC to compete and should therefore be preempted under 47 USC §253. In reversing the district court's ruling that a 5% gross revenue fee on CLECs did not materially inhibit competition, the court noted, "the requirements of §253 are not inflexible, however. The statute does not require precise parity of treatment ... Municipalities can take into account different costs incurred by different uses of the rights-of-way."[12] The court went on to give examples of how a city could negotiate different agreements with different providers and still pass muster under §253, "provided there was a rough parity between competitors".[13] (Emphasis added)

TAM submits that when there is a comparison of the differences between CLEC and rural ILEC service costs, and legal and regulatory requirements, there is a "rough parity" between competitors, if not a decided competitive advantage for the CLECs. In determining whether there is such parity, the Commission should take into consideration the various differences in legal and regulatory requirements and network costs of the ILECs and CLECs, respectively.

In its Initial Comments, the MPSC accurately summarized many of these differences which result in a competitive advantage for CLECs, as follows:

> [t]he joint CLECs' unsupported claims seem to defy the MPSC's experience of the relative competitive advantage between the CLECs and the smaller, rural ILECs in Michigan. At least in Michigan, small ILECs face a number of 'legacy' costs that CLECs traditionally do not. The smaller ILECs own, and must maintain, much of the rural telecommunications infrastructure in the State of Michigan. Even in the limited service area where CLECs have their own infrastructure, the ILECs' infrastructure generally tends to be older and in greater need of repair or replacement. And, the smaller ILECs serve as 'carriers of last

[12] 305 F3d at page 80.
[13] *Id.*

> resort' in Michigan, ensuring basic service to all comers within their service territory, unlike the selective ability of the CLECs to cherry pick the more-attractive customers. All of these attributes of small ILECs represent additional costs not traditionally born by the CLECs. These are exactly the kinds of costs that Michigan's Legislature had in mind when it enacted Act 182's restructuring mechanism.[14]

With regard to this cost disadvantage, which rural ILECs have, in *Alenco Communications v FCC*, 201 F3d 608 (5th Cir 2000) the Court of Appeals observed:

> Rural LECs face special obstacles. The cost of providing telephone service varies with population density, because dispersed populations require longer wires and permit lesser economies in installation, service and maintenance. Also relevant are geographic characteristics, for climate and certain types of terrain, make service calls and repairs more costly. Rural areas where telephone customers are dispersed and terrain is unaccommodating, are therefore the most expensive to serve.[15]

These costs disadvantages for Michigan ILECs make it clear that the future prospect of the receipt of funds from the restructuring mechanism under Act 182 will not translate into a competitive advantage for ILECs that would create an impermissible barrier to entry in violation of 47 USC §253(a). At the very least, the Commission needs to be presented with more than the conclusory statements of Petitioners about the alleged existence of a competitive disadvantage. As the MPSC noted:

> [i]n order to accurately access whether Act 182 has the 'effect of prohibiting the ability of [an] entity to provide ... intrastate telecommunication services' or whether Act 182 is 'competitively neutral,' the Joint CLECs would need to present the FCC with detailed documentary evidence concerning a relative cause, capital investments, and any other matters material to determine relative pricing circumstances of the Joint CLEC in their competing small ILEC. Absent such evidence, the Joint CLEC's claim that Act 182 violates §253(a) is raw conjecture and fails to meet the FCC's

[14] MPSC Comments at pp 10-11. See also the Comments of ITTA that "Indeed the notions of regulatory parity are tempered by the disparate requirements to which the ILECs and CLECs are each bound." p 8.
[15] 201 F3d at 617.

standards for petitioners putting forth a case for preemption under §253(d).[16]

IV. EVEN IF THE COMMISSION WERE TO FIND THAT ACT 182 RUNS AFOUL OF 47 USC §253(A) (WHICH IT DOES NOT), ACT 182 SATISFIES THE "SAFE HARBOR" PROVISIONS OF 47 USC §253(A) BY ADVANCING UNIVERSAL SERVICE AND PRESERVING QUALITY OF SERVICE.

For the same reasons that Act 182 does not have the effect of materially inhibiting competition discussed above, it is competitively neutral within the meaning of 47 USC §253(b). Competitive neutrality has been interpreted to mean where the regulations in question neither unfairly advantage nor disadvantage one provider over another. Clearly, Act 182 satisfies this requirement of the 47 USC §253(b) safe harbor.

In its Opposition, AT&T articulated the manner in which Act 182 is consistent with the Commission's universal service principles, the second prong of the 47 USC §253(b) test.[17] That discussion will not be repeated here.

VI. ACT 182 IS CONSISTENT WITH SEVERAL OF THE COMMISSION'S STATED POLICY GOALS FOR THE REFORM OF ACCESS RATES, INTERCARRIER COMPENSATION, AND USFS SUPPORT.

In their Initial Comments, several parties observed that Act 182 takes important steps in Michigan toward achieving at least three stated policy goals of the Commission:

1. Reducing intrastate switched access rates to interstate rate levels;
2. Removing implicit support from switched access rates and making it explicit; and
3. Helping ensure that telecommunication services to end users, particularly in areas served by rural ILECs, remain affordable.

The consistency of Act 182 with Commission policy goals was made even clearer after a brief review of the Commission's just released National Broadband Plan.[18]

[16] MPSC Comments at pp 11-12.
[17] Opposition of AT&T Inc., pp 23-25.

In Chapter 8 Availability, the National Plan urged in one of its core Recommendations that "the FCC should conduct a comprehensive reform of universal service and intercarrier compensation in three stages to close the broadband availability gap."[19] In describing how this comprehensive reform should be achieved, the Commission described a set of "guiding principles", one of which was "No flash cuts. New rules should be phased in over a reasonable time period. Policymakers must give service providers and investors time to adjust to a new regulatory regime."[20]

Act 182 is fully consistent with this guiding principle in providing CLECs time to adjust to the phased-in reduction of intrastate access rates.

In describing its recommendation for a framework of intercarrier compensation reform, the Commission stated that "The first step of the staged reform should move carriers intrastate terminating switched access rates to interstate terminating switched access rate levels in equal increments over a period of two to four years."[21]

Act 182 is consistent with this phased approach to a reduction in intrastate switched access rates for CLECs, although the reductions are to be phased in over five years.[22] However, Act 182's access rate reform is more aggressive than the Commission's recommended approach in that the Act 182 reductions required in intrastate switched access rates for both ILECs and CLECs includes originating access rates also.

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[18] Connecting America: The National Broadband Plan (National Plan) delivered to Congress by the Commission on March 16, 2010.
[19] National Plan at p 135.
[20] National Plan at p 143.
[21] National Plan at p 148.
[22] Moreover, Act 182 expressly provides that "if the federal government adopts intercarrier compensation reforms", the MPSC is authorized to conduct a proceeding commencing within 60 days of the federal action "to determine whether any modifications to the size, operation, or composition of the restructuring mechanism are warranted". Section 310(18), MCL 484.2310(18).

In Recommendation 8.10, the Commission urged the broadening of the Universal Service contribution base, noting that "information services" are not part of the base.[23] By comparison, Act 182 authorizes the MPSC to conduct a proceeding to consider expanding participation in the restructuring mechanism "if the Federal Communications Commission determines that interconnected voice over internet protocol services may be subject to state regulation for universal services purposes".[24]

Finally, the Commission clearly recognized the reality of serving the low density rural areas traditionally served by small ILECs, and the policy issues that flow from that reality, noting:

> Areas with extremely low population density are typically unprofitable for even a single operator to serve and often face a significant broadband availability gap. Subsidizing duplicate, competing networks in such areas where there is no sustainable business case would impose significant burdens on the USF and, ultimately, on the consumers who contribute to the USF.[25]

Act 182 is consistent with this approach in limiting eligibility to funds from the restructuring mechanism to ILECs.

CONCLUSION

The history of Act 182 described in various Initial Comments shows that it took almost one year for the Michigan Legislature to achieve final passage of this significant legislation. However, in its final form, Act 182 received overwhelming approval by both branches of the Legislature.[26] TAM submits that granting the relief requested by Petitioners is unwarranted as a matter of law and the facts presented here. Moreover, granting such relief would send the wrong

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[23] National Plan at p. 149.
[24] Section 310(13), MCL 484.2310(13). TAM submits that "universal services purposes" in this context is intended as a shorthand reference to the restructuring mechanism.
[25] National Plan at p. 145.
[26] See TAM Opposition at p. 14.

message to state legislatures and regulatory agencies that may consider for their jurisdictions whether to tackle the hard problems addressed by Act 182. Preemption of Act 182 would further deter states from taking a reasoned, fact-based approach to addressing issues of access and universal service reform for their constituents, issues that have been awaiting final FCC action for years. The MPSC put it aptly when it urged as follows: "Given that the FCC has not yet acted on national intercarrier compensation reform, the FCC should not penalize those states that have chosen to reform intrastate access charges, without extremely compelling reason."[27]

Consideration of the manner in which Act 182 has taken certain steps to address some of these policy issues should be addressed, if at all, on a comprehensive basis, not as part of a narrow 47 USC §253 preemption proceeding. The relief requested in the Petition and Motion for Temporary Relief should be denied in its entirety.

Respectfully submitted,

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Dated: March 19, 2010

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[27] MPSC Comments at p 15.